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SR 147

## Why is NFIB and NFIB Legal Center So Concerned About the Federal Government's Clean Water Act Land-Grab?

Posted on May 21, 2014 by Luke Warr

### \$37,500 Per Day in Penalties for a CWA Violation

Not too long ago, NFIB Small Business Legal Center came to the defense of an ordinary Idaho couple facing serious heat from the Environmental Protection Agency (EPA). Mike and Chantell Sackett were looking at ruinous fines for allegedly violating the Clean Water Act. We're talking shock-and-awe tactics here.

EPA was threatening to impose \$37,500 per day in fines because the Agency believed the Sacketts had illegally filled a wetland when they began laying the foundation for their dream home. But that didn't make any sense to the Sacketts because their property wasn't wet in the least, and was entirely surrounded by other developments. Until EPA came knocking they had no idea that their property might potentially be considered a "wetland" under the CWA.

### The Scope and Reach of the CWA is Notoriously Unclear

Of course, there is a lot of room for lawyers to argue over whether any given property falls within EPA's jurisdiction. To be sure, the jurisdictional reach of the CWA is notoriously unclear. But that hasn't stopped the EPA and the Army Corps of Engineers from making untenable assertions of jurisdiction, as in the Sackett case. Even crazier, EPA wasn't even going to let the Sacketts dispute its jurisdiction—but was instead insisting that they needed to restore their property to its natural state at great expense, or face an additional \$37,500 per day in fines. So that would have been \$75,000 in daily fines for the Sacketts—all because they began building on a dry section of their property, without realizing that they were stepping into an environmental minefield.

### The Mere Assertion of Jurisdiction is usually a Death Knell for Development Plans

The Sacketts had to fight all the way to the Supreme Court just to secure their right to have a day in court to dispute EPA's assertion of CWA jurisdiction. And now they are embroiled in an protracted legal battle over whether in fact their property is—or is not—a jurisdictional wetland for the purposes of the CWA. If it is, then they are facing monstrous liabilities for illegally filling-in a wetland. If it isn't, then EPA has—once more—overstepped in manner that has surely caused terrible stress, anxiety and grief to the Sackett family.

Luckily the Sacketts have found pro bono counsel, at Pacific Legal Foundation, to help with their legal battle. But most folks facing a potentially ruinous EPA enforcement action would have no choice but to settle because of the astronomical costs of litigating a full-blown jurisdictional case with the federal government. Indeed, the legal costs alone are enough to burry most small business owners and ordinary individuals—even when the Agency is truly in the wrong.

And when you factor in the reality that a jurisdictional battle is always going to be a crapshoot—because folks of reasonable intelligence often disagree on the reach of the CWA—it shouldn't be surprising that most people feel that they have no choice but to capitulate to the Agency's demands when EPA or Army Corp assert jurisdiction. That means giving up on any hope of ever developing on that portion of your property—or for that

matter making any economically beneficial use at all. Of course, if you make a mistake and begin using a portion of your land that the Agency later says is a wetland, you are usually left with little choice but to pay a big-time settlement to avoid an even more devastating enforcement action. In practical terms, this means that the Agencies can literally scare small business owners, and ordinary landowners into leaving their property in a natural undeveloped state—a result that the environmental crusaders encourage.

### **An Assertion of Jurisdiction Greatly Devalues Private Property**

Suffice it to say, it's a big deal if the government asserts that your property contains wetlands because that means you can't do anything with your land—at least not with the portion covered by the CWA. Theoretically you could apply for a permit in some cases. But those permits are exceedingly difficult to obtain, and exorbitantly expensive. As of 2006 the average permit cost the applicant over \$270,000. So for these reasons, the mere assertion that a portion of your property is covered by the CWA means an immediate—and serious—depreciation in value.

This is why NFIB and NFIB Small Business Legal Center take CWA issues so seriously. We know that small business owners invest substantial resources when acquiring real property. For many businesses your property is essential for your operations. So we know how difficult it is if government tells you that a portion of your land is essentially off-limits. And we know that, if you have tied up tremendous resources in your land, it's a serious financial blow when government regulation depreciates the value of your property.

### **EPA and Army Corps Say the Proposed Regulation Will Not Hurt Small Business?**

As detailed in [Monday's post](#), EPA and Army Corps are currently in the process of finalizing a new regulation that will radically expand CWA jurisdiction. We're calling this a massive regulatory land-grab because the Agencies will make it effectively impossible for many landowners to use portions of their land that were never previously considered "jurisdictional wetlands." In other words, your private property will become—essentially—nature preserve.

Amazingly EPA and Army Corp are claiming that this regulatory land-grab will have no adverse impact on the small business community. Without being hyperbolic, we can say that is definitively not true because—as explained earlier—whenever the Agencies assert CWA jurisdiction, private property values are seriously depreciated. And of course in so radically asserting jurisdiction, the Agencies will only be imposing financial hardships on businesses, and discouraging economic development. So it is not clear how the Agencies can even make this assertion with a straight face.

Their claim is that, in radically expanding CWA jurisdiction, they're actually helping small business by bringing regulatory predictability. And of course it is true that small business generally appreciates predictability. But one cannot claim to be giving a benefit to small business by resolving every issue in favor of federal regulatory powers, and against the right of business owners to make reasonable uses of their own property. That line of argument is a classic subterfuge. Simply put, the federal CWA land-grab is going to hurt small business and the Agencies know it.